

THE NCAA AND ITS AMATEURISM POLICY ARE ONCE AGAIN ON TRIAL FOR VIOLATING ANTITRUST LAWS

By: Dalton Thacker

The NCAA

The National Collegiate Athletic Association (the "NCAA") claims to prize amateurism above all else, yet it continues to pocket over a billion dollars per year from the work of the amateur athletes who participate in its member conferences. In its youth, the NCAA could not have foreseen the multibillion-dollar industry that it currently governs. Today, this system is at best outdated and at worst oppressive. While the NCAA continues to fight in court to maintain its power, student-athletes are being exploited for the hours of work that they provide and are prohibited from using their name recognition for their own financial benefit.

Current Litigation

The plaintiffs in *In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation*¹ ("*Grant-in-Aid*") are the most recent in a line of litigants who are challenging the NCAA's infamous amateurism policy. The amateurism policy states that an individual loses his or her amateur status and thus is ineligible for college athletics, if the individual uses his or her athletic skill (directly or indirectly) in that sport and receives compensation in any form, including accepting a promise of payment, receiving any financial assistance from a professional sports organization based on athletic skill, or entering into an agreement with an agent.

This case, which is pending before the U.S. District Court of Northern California, questions whether the NCAA's amateurism rules violate antitrust laws by limiting the amount that NCAA institutions may pay student-athletes. NCAA colleges are businesses which, under the Sherman Act, should be required to compete



Photo Credit: Dalton Thacker

with one another for students and student athletes. However, the NCAA uses its amateurism regulation to cap the amount that colleges may compensate athletes to only scholarships for room, books, board, tuition, and a small cost of attendance stipend. Through the lens of the Sherman Act, this conduct is an anticompetitive conspiracy between competitors – which is the crux of the case in *Grant-in-Aid*.

Specifically, the plaintiffs in *Grant-in-Aid* are asking the court to completely remove the NCAA's compensation cap, which prevents student-athletes from being paid any amount over the cost of attendance. This result may seem desirable; however, as I will explain more fully below, a clearer and more ideal solution would be for the court to require the NCAA to amend its amateurism policy to allow student athletes to profit from the use of their name, image or likeness ("NIL"), and to be eligible to qualify for the Federal Work Study Program

("FWS"). FWS provides funds for part-time employment to help lower-income students finance the costs of postsecondary education.

Antitrust and Basketball

The issues presented in *Grant-in-Aid* resemble those litigated in the *O'Bannon* case decided in 2013. Ed O'Bannon, previous NCAA basketball All-American player, brought an antitrust class action suit claiming that the NCAA's rules illegally prevented schools from compensating athletes for the use of their NIL. In August of 2014, Judge Claudia Wilken (who is presiding over the *Grant-in-Aid* case) held in *O'Bannon* that the NCAA's compensation rules were an unlawful restraint of trade. However, two of the three judges also concluded that preserving amateurism was an important goal and that any compensation which athletes receive had to be related to education. In *O'Bannon*, a key issue became whether any compensation in excess of the usual scholarships crossed an important line which would reduce consumer interest in college sports – a procompetitive justification which the NCAA heavily relies on. Ultimately, the court held that the NCAA violated the Sherman Act by capping compensation at athletic scholarships which were below the full cost of tuition. The NCAA was not held liable for violating the Sherman Act and all compensation beyond educational expenses was banned.

Despite this somewhat counterintuitive holding, *O'Bannon* does not prevent the court in *Grant-in-Aid* from imposing substantial changes to the NCAA's current amateurism policy.

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As in *O'Bannon*, the *Grant-in-Aid* litigation will likely focus on the argument that college athletes receive less than a competitive market would provide – showing this is an anticompetitive effect of the amateurism policy. The NCAA's strongest counterargument is that these restraints are necessary to further the popularity of college sports. The NCAA proffers that the amateur nature of college sports is directly attributable to its popularity. If the athletes were paid, the NCAA seems to believe, college sports would begin to mirror a minor league system, and the student-athletes would no longer be playing for the love of the game but instead for a paycheck. The NCAA argues that it is this distinction that gives college athletics its billion-dollar allure.

Issues with the Proposed Solution

However, if the NCAA could promote amateurism just as effectively, but in a way that is less restrictive and less harmful to athletes, then, under the antitrust precedent, its existing anticompetitive restraints should be condemned.

Removing the compensation cap outright, without a cognizable guide for colleges to follow, would lead to disaster. If the cap was removed and conferences were given complete autonomy to govern the issue, colleges would compete for athletes by any means available. For example: a five-star basketball recruit could receive an offer from the University of Washington for a \$500,000 salary, Washington State University may offer him a Ferrari, and Gonzaga University could offer him a beach-front condo in California.

Additionally, a complete removal of the cap would lead to an inequitable system where those colleges with the most capital are able to offer more money to incoming athletes, thereby diminishing the competitiveness

between schools and conferences. Many college athletic departments operate in the red, including some of the leading institutions. These schools remain competitive now because the cap prevents other colleges from outbidding them for top talent. However, if the cap were removed, some of these smaller colleges would quickly fall behind because of their inability to compete financially with the top money earners of the NCAA. Therefore, removing the cap entirely would result in an inequitable athletic experience where a few top schools dominate the competition because of their ability to pay top dollar to acquire the world's top athletes.

Alternate Solution: Allowing athletes to profit from their own NIL

There is, however, an alternative which would be more easily implemented and equitable: the court in *Grant-in-Aid* should require the NCAA to amend its amateurism bylaw, thereby forcing reform, which would allow student athletes to market their NIL in order to generate profit on their own behalf.

The NCAA is a unique business, in that it prevents its participants from profiting from their own NIL. As a collegiate basketball player, had I autographed my jersey and sold it to a fan (however unlikely that may have been), I would have violated the NCAA's amateurism policy and would have been banned from participating in college athletics. This policy does not, however, prevent the NCAA from signing million-dollar broadcast deals where the athletes' NIL are displayed on national television, or from licensing the player's likeness to a company like Electronic Arts (EA) to be used in video games. Colleges are also free to sell merchandise displaying the NIL of their most popular players without paying the athletes any royalties. These examples illustrate

the illogical result of the NCAA's amateurism policy.

Changing these rules and allowing athletes to profit from the use of their own name recognition is a logical and easily implemented step. If athletes were permitted to accept endorsements, this would allow the leading athletes in the nation to earn the revenue that is generated solely because of their popularity—revenue that is generated because of the athlete's name recognition. This alternative would neither make college athletics resemble a professional league, nor would it would lead to the inequitable college athletic landscape that an outright elimination of the compensation cap would produce. Therefore, the NCAA's main procompetitive justification would be rendered irrelevant, and the core purpose of the amateurism requirement that the NCAA has propounded will endure unscathed.

Limitations to This Solution

Although this solution would eliminate some of the exploitation and inequality that currently exists in college athletics, it would only aid that small portion of college athletes who have national name recognition. Other athletes who are less renowned still forego a job to spend countless hours working as a student-athlete, without compensation. To resolve this undesired consequence, student athletes should be permitted to receive compensation through FWS. The program is need-based, so only athletes who are in financial need will qualify. Student-athletes are currently prohibited from participating in this program because of the NCAA's amateurism regulation, which prohibits them from receiving compensation in any form other than scholarships for the work that they provide as student-athletes. College athletes can

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struggle with poverty, an issue which may even continue post-college, simply because the athletes dedicate their time and energy to a sport rather than a traditional job. This problem can be solved by allowing the students to qualify as employees of their colleges under FWS, thereby earning an hourly wage for the time spent in the gym, weight room, film study, etc.

Conclusion

The *Grant-in-Aid* litigation illustrates the widespread disapproval of the current NCAA structure. Change is inevitable, but this change need not be a complete overhaul or elimination of college athletics as we know it. Instead, the court should consider a less invasive resolution than removing the compensation cap outright. To that end, the court should strike down the NCAA's amateurism bylaw, thereby forcing the NCAA to allow college athletes to receive compensation generated by their NIL and to enable them to qualify for the FWS program. ■

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